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No. 09-717

In the
Supreme Court of the United States

DELMA BANKS,
Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

ANDREW WEBER
First Assistant
Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
for Criminal Justice

* Counsel of Record

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

* KATHERINE D. HAYES
Assistant Attorney General
Postconviction Litigation Division

Texas Attorney General's Office
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400; 320-8132 fax

ATTORNEYS FOR RESPONDENT

This is a capital case.

QUESTION PRESENTED

Petitioner Delma Banks was convicted and sentenced to death for committing murder during the course of a robbery in April 1980. During federal habeas proceedings in 1999, the court granted discovery and prosecutors produced their investigative file, including a previously undisclosed transcript of a pretrial interview with Charles Cook, a key witness for the State at Banks's trial. Banks argued that suppression of the impeachment evidence contained in the Cook transcript violates *Brady v. Maryland*, 373 U.S. 83 (1963). The district court agreed and conditionally granted habeas relief on the conviction. *Banks v. Quarterman*, No. 5:96-cv-353 (E.D. Tex. Apr. 1, 2008 memorandum opinion) (unpub.). The Fifth Circuit vacated the judgment after determining the Cook transcript is not material and its suppression does not undermine confidence in the outcome of trial. *Banks v. Thaler*, 583 F.3d 295, 332 (5th Cir. 2009). Banks petitions this Court for review of the following issue:

> Should certiorari review be granted to confirm that the *Brady* materiality standard is satisfied when the prosecution purposefully suppresses evidence discrediting its linchpin witness?

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On April 12, 1980, Banks[1] murdered 16-year-old Richard Wayne Whitehead, stole the young victim's distinctively-colored Mustang, and drove to Dallas, Texas. There, Banks met Charles Cook who befriended him and gave him a place to stay until April 14th, when Banks returned home to Texarkana at the urging of Banks's mother. While in Dallas, Banks told Cook that he shot and killed a boy, and took his car, and the two men sold various items taken from the victim's car. When Banks departed for East Texas, he left the stolen car and the murder weapon with Cook. However, Cook abandoned the car and sold Banks's pistol to a next door neighbor. On April 23rd, Banks was arrested when he drove to Dallas with two associates (one a police informant) in order to get "his gun" from Cook. Cook assisted in retrieving Banks' pistol, and on April 24th, provided a sworn statement to police. Before testifying at guilt/innocence as a key witness for the State, Cook was interviewed by members of the prosecution team. While the pretrial interview was transcribed, it was not disclosed to Banks's counsel until 1999 when discovery was ordered during federal habeas proceedings.

Banks asserted a *Brady* claim based on the impeachment value of the Cook transcript, but the courts did not reach the merits until remand.[2] In 2006, the

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[1] Respondent Thaler is referred to as "the Director."

[2] Banks did not amend his habeas petition to include a Cook-transcript *Brady* claim, but on appeal argued the issue was litigated by implied consent. Fed. R. Civ. P. 15(b). On remand, the district court held the issue was litigated by such consent, and the Fifth Circuit affirmed the ruling. *Banks v. Quarterman*, No. 5:96-cv-353 (Apr. 1, 2008 memorandum opinion) (unpub.); *Banks v. Thaler*, 583 F.3d at 309. Considering the abuse of discretion standard on review, the Director does not contest that determination.

magistrate judge recommended the court deny relief because nondisclosure of the Cook transcript does not undermine confidence in the verdict of Banks's guilt. App. 150-56.[3] The district court concluded otherwise, and ordered that Banks was entitled to conditional habeas relief from his capital murder conviction. App. 122-38. After considering the usefulness of impeachment evidence contained in the Cook transcript in light of substantial corroboration of Cook's trial testimony, the Fifth Circuit held that the suppressed evidence was not material under *Brady* and, therefore, vacated the grant of relief. App. 28-81.[4]

Because the Fifth Circuit's assessment of the Cook-transcript *Brady* issue fully comports with federal habeas jurisprudence and Supreme Court precedent, the Court should not hesitate to deny review.

STATEMENT OF THE CASE

In September 1980, Banks was convicted and sentenced to die for intentionally killing Richard Wayne Whitehead during the course of a robbery. Banks's conviction and sentence were affirmed on direct appeal. *Banks v. State,* 643 S.W.2d 129 (Tex. Crim. App. 1982), *cert. denied,* 464 U.S. 904 (1983). Between 1984 and 1996, Banks filed three state habeas applications, all of which were denied by the Court of Criminal Appeals.[5]

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[3] "App." refers to the appendix accompanying Banks's petition, while "Cert. Pet." denotes the actual petition.

[4] The Fifth Circuit's opinion does not affect this Court's grant of relief for Banks's sentence. *Banks* v. Dretke, 540 U.S. 668, 689 (2004) (suppression of Robert Farr's paid informant status).

[5] *Ex parte Banks*, No. 13,568-01 (Tex. Crim. App. Feb. 29, 1984) (unpub.); No. 69,302 (Tex. Crim. App. Sept. 26, 1984)

In March 1996, Banks petitioned for federal habeas relief. 1 R 1-63.[6] Regarding State's witness Charles Cook, Banks argued that the prosecution violated *Brady* by failing to disclose evidence which would have "linked" Cook to Robert Farr (who Banks alleged were the real killers), and which would have revealed Cook's "enormous incentive" to testify favorably for the State in exchange for a deal to dismiss pending criminal charges for arson. 1 R46-47. Banks also argued the prosecution failed to reveal Robert Farr was a police informant and Banks's arrest was a "set-up." 1 R 46.

After the United States Magistrate Judge issued an order granting discovery, the Bowie County District Attorney's Office produced its investigative file which included a transcript of the September 1980 pretrial interview with Cook. During a June 1999 evidentiary hearing, both the investigate file and the Cook transcript were admitted into evidence. *See* RX-1 (file); PX B-4 (transcript).[7] Additionally, Bowie County Assistant District Attorney James Elliott (one of the prosecutors at Banks's trial) confirmed that the former district attorney (deceased by the time of the hearing) possessed the Cook transcript at trial, that notes on the transcript were the district attorney's handwriting, and that the transcript was not disclosed to Banks's counsel prior to or during trial. 6 R 44-47.

(unpub.), *rhrg*, 769 S.W.2d 539 (Tex. Crim. App. 1989); No. 13,568-03 (Tex. Crim. App. Jan. 10, 1996) (unpub.).

[6] "R" refers to the federal habeas record on appeal, preceded by volume number and followed by page reference.

[7] "PX" or "RX" refers to numbered exhibits offered by petitioner Banks or respondent Thaler during the hearing. A boxed set of exhibits is included in the habeas record on appeal.

Banks raised a Cook-transcript *Brady* claim in post-hearing briefing, and later in his proposed findings and conclusions; however, the court did not reach the merits. 3 R 790, 795; 4 R 927, 930-31, 953-61. The district court, adopting the magistrate judge's recommendation, was unpersuaded by Banks' *Brady* claim alleging that Cook had a deal with prosecutors to give false testimony in exchange for the dismissal of a pending, unrelated arson charge because, *inter alia*, the arson had not yet been committed when Cook provided his sworn April 1980 affidavit to police. *Banks v, Johnson*, No. 5:96-cv-353 (E.D. Tex. May 11, 2000 report and recommendation) (unpub.); *id.*, 2000 WL 35482430 (Aug. 18, 2000 memorandum opinion) (unpub.). Pursuant to the recommendation of the magistrate judge, the district court concluded that Banks was entitled to habeas relief with respect to his death sentence because (1) Robert Farr's informant status had not been disclosed by the State,[8] and (2) counsel were ineffective in developing a case for mitigation. *Id.* Banks's motion to to amend the judgment to include the Cook-transcript *Brady* issue was denied. 5 R 1211-12, 1263-65.

On the Director's appeal, Banks applied for a certificate of appealability (COA) to cross-appeal five issues, including two *Brady* issues—the Cook-transcript claim, and the deal-for-Cook's-testimony claim. Because the district court rejected the Cook-transcript issue as improperly pleaded, 5 R 1263-65, Banks asserted that the issue was tried by implied consent. Fed. R. Civ. P. 15(b). In 2002, the Fifth Circuit reversed the district court's grant of habeas relief and denied COA on Banks's cross-

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[8] Although Robert Farr testified at both stages of trial, the court found his suppressed informant status immaterial to guilt/innocence. *Banks*, 2000 WL 35482430, at *2.

appeal. *Banks v. Cockrell*, 48 Fed.Appx. 104, 2002 WL 31016679 (5th Cir. Aug. 20, 2002) (unpub.). This Court reversed the Fifth Circuit on the Farr paid-informant *Brady* claim and granted Banks a new sentencing hearing. *Banks*, 540 U.S. at 698, 705-06.[9] The Court also reversed the denial of COA for the Cook-transcript claim, finding the Rule 15(b) issue debatable. *Id.* at 703-06.

On remand, the Fifth Circuit held that Rule 15(b) is applicable to the Cook-transcript *Brady* claim based on the record before it, and then remanded for a determination of whether the issue was actually tried by implied consent and, if so, whether it merited relief. *Banks v. Dretke*, 383 F.3d 272, 280-81 (5th Cir. 2004). In 2006, United States Magistrate Judge Caroline Craven recommended the court find implied consent, but deny the substantive claim. App. 139-57. On April 1, 2008, the district court, the Honorable United States District Judge David Folsom presiding, adopted the implied-consent recommendation, decided the *Brady* claim had merit, conditionally granted relief on Banks's conviction, and issued final judgment. App. 122-38.

Following briefing and argument, on September 18, 2009, the Fifth Circuit affirmed the ruling on implied consent, vacated the grant of relief after concluding that the Cook transcript is not material *Brady* evidence, and remanded for proceedings consistent with this Court's 2004 grant of sentencing-phase relief. App. 1-82. On Banks's petition for certiorari review, the Director files this opposition.

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[9] Given the Court's disposition of the paid-informant *Brady* claim and its conclusion that a writ should issue with respect to Banks's sentence, the Court found it unnecessary to address Banks' ineffective assistance claim. *Banks*, 540 U.S. at 689, n. 10.

STATEMENT OF FACTS

I. Facts of the Crime

The Fifth Circuit summarized the facts of Banks's capital crime:

> On Friday evening, [April 11,] 1980, 16-year-old Richard Whitehead (the victim) and a 14-year-old female friend encountered 21-year-old Banks at a bowling alley, and agreed to give him a ride home. Departing in the victim's distinctive, multi-colored Mustang, the trio ended up drinking Coors beer together in a secluded park near Nash, Texas. Nash is approximately four miles west of Texarkana, Texas, and is located in Bowie County.
>
> Around 11:00 p.m., the trio left the park and drove the victim's friend home. The victim and Banks left the friend's house in the Mustang; they briefly visited another of the victim's friends; and, shortly before midnight, the victim and Banks left that house together in the Mustang.
>
> A few hours later, at about 4:00 a.m. on Saturday, [April 12th], two gunshots were heard coming from the part of the park where the victim and Banks had been drinking beer. On [April 15th], the victim's body was found in that portion of the park. He had been shot three times with what was later determined to be a .25 caliber Galesi pistol (one of the shots was between his eyes from very close range); his Mustang was missing; and empty cans of Coors beer

were strewn about.

On Saturday morning, [April 12th], Banks traveled approximately 175 miles to Dallas, Texas. He arrived by 8:30 a.m., about four and one-half hours after the gunshots had been heard. When Banks arrived in Dallas, he was driving a distinctive, multi-colored Mustang.

In Dallas, on the morning Banks arrived, Charles Cook and his wife were standing outside, waiting for a bus. Banks, who did not know them, pulled up in the Mustang and asked for directions. Cook talked Banks into giving his wife a ride to work, and the three departed in the Mustang. After dropping Cook's wife off at work, Cook and Banks continued to ride around together for much of the day; they visited some of Cook's acquaintances; and Banks stayed the next two nights with Cook and his family at Cook's grandparents' house in Dallas (Cook's house).

That Saturday, [April 12th], while riding around Dallas in the Mustang, and after Cook noticed blood on one leg of Banks'[s] trousers, Banks said he had shot a "white boy". That evening, Banks told Cook that he had "decided to kill the white boy for the hell of it and take his car and come to Dallas". Cook noticed that Banks had a pistol; the next evening (Sunday), Cook took the pistol away from Banks and hid it. It was later identified as the .25 caliber Galesi murder weapon.

On Sunday, [April 13th], Banks made a collect call to his mother in Texarkana, from Cook's house; Banks'[s] mother urged him to turn himself in. Later that weekend, Banks shared this information with Cook's neighbor, Bennie Lee Jones.

After spending Saturday and Sunday night with Cook, Banks was given money by Cook's wife; and, on Monday, [April 14th], he boarded a Greyhound bus bound for Texarkana. (Nash, where Banks lived, is near Texarkana.) Early on Tuesday morning, [April 15th] (the day the victim's body was found near Nash), Cook abandoned the multi-colored Mustang in West Dallas; it was never recovered. Shortly thereafter, Cook sold Banks'[s] .25 caliber Galesi pistol, along with some jumper cables and tools from the Mustang, to his neighbor, Jones.

Later that month, Banks telephoned Cook twice, in an attempt to recover his (Banks'[s]) pistol. On [April 23rd], Banks returned to Dallas. He traveled with two acquaintances, [Robert] Farr and Marcus Jefferson; and, unknown to Banks, he was followed by law-enforcement personnel. Farr was Banks'[s] girlfriend's brother-in-law. (As noted, he was also a paid police informant; this suppressed status was the basis for the [Supreme] Court's granting habeas relief for Banks'[s] sentence.) Marcus Jefferson was Banks'[s] girlfriend's brother.

> Upon arriving in Dallas, Banks drove around, looking for Cook's house. Upon locating it, Banks went to the door of the house, while Farr and Marcus Jefferson waited in the vehicle; Banks asked Cook for his (Banks'[s]) gun; he returned to the vehicle; and they departed. In the vehicle, Banks told Farr and Marcus Jefferson: Cook didn't have his (Banks'[s]) gun because he had given it to someone else; and Cook, instead, gave Banks a .22 caliber pistol.
>
> Departing from Cook's house, Banks, still traveling with Farr and Marcus Jefferson, apparently got lost trying to find the way back to the highway. The still-trailing law-enforcement personnel, after observing several traffic violations, initiated a traffic stop of Banks'[s] vehicle. A .22 caliber pistol was recovered from the vehicle; Banks was arrested; and, after his arrest, Farr and Marcus Jefferson were released.
>
> On [April 24th], the day after Banks had attempted to retrieve his pistol from Cook, law-enforcement personnel: visited Cook; asked for Banks'[s] pistol; and were taken, by Cook, to Jones'[s] house. There, Jones returned the .25 caliber Galesi pistol to Cook, who provided it to the police. (This was the pistol later determined to be the murder weapon.)

App. 4-7.

II. Pretrial Statements of Charles Cook

Prior to Banks's trial, the prosecution possessed three statements from Charles Cook. The first two statements, entitled "Affidavit In Any Fact," were taken at the Dallas police station on April 24, 1980, in the early morning hours after Banks had left Cook's home with a gun provided to him by Cook. *See* PX B-2 & PX B-3.

In his first affidavit, Cook related that he met Banks around 8:00 a.m. or 8:30 a.m. on April 12, 1980 while Cook was standing at a bus stop, PX B-2 at 1; that Banks was driving "a fast hot rod two-tone green Mustang," *id.*; that Banks drove Cook's girlfriend Ida Martin (who later became Cook's wife) to work, *id.*; that Cook took Banks back to his family's home in Dallas, *id.*; that Cook gave Banks a change of clothes because Banks did not have any with him, *id.*; that Banks had blood on his right leg, *id.*; that Banks said he "got in to it with a white boy coming to Dallas on the highway," and had shot and killed him, *id.*; that Banks later told him he "and this white boy were in the woods in Texarkana drinking" when Banks thought about killing him and taking his car to Dallas "just for the hell of it," *id.* at 2; that at some point Banks gave Cook a gun which Cook later sold to Cook's neighbor, *id.*; that Banks left the gun and the car with Cook, *id.*; and that Cook took Banks to the Greyhound Bus station for him to travel back to Texarkana. *Id.*

In the second affidavit, Cook explained that he (along with officers) retrieved a .25 caliber AG Brand pistol from his neighbor Mr Bennie Lee Jones on April 24, 1980, and that was the same gun Banks had previously given to Cook. PX B-3.

The third statement is the 38-page,[10] undated, unsigned transcription of a pretrial interview of Cook conducted by members of the prosecution team and Investigator Willie Huff of the Bowie County Sheriff's Department. *See* PX B-4.

> The transcript's first 18 pages consist largely of Cook's description of the events at issue, beginning with the moment he met Banks and continuing through [April 24,] 1980, when he provided the police with the affidavit; the interviewer's interruptions in this portion of the transcript are minimal and clarifying in nature. The balance of the transcript consists primarily of the interviewer's probing and testing Cook's story; pointing out inconsistencies in his statements; pressing him for further details; and questioning him about his criminal history and legal problems.

App. 10-11.

The prosecution provided a copy of Cook's April 1980 affidavits to Banks's counsel during trial and prior to counsel's cross-examination of Cook. 9 RR 2312. The Cook transcript was not disclosed until discovery was ordered in March 1999, three years after Banks filed his federal habeas petition. The nondisclosure of the Cook transcript was the basis for the *Brady* claim on which the district court granted relief.

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[10] Although the total document is 75 pages long, it consists of one complete copy of a 38-page Cook transcript, and a nearly-complete second copy. The complete copy has some underlining and other handwritten notations made by the lead prosecutor at Banks's trial. *See* PX B-4; 6 R 44-45

III. Evidence and Argument at Guilt/Innocence

The two-day guilt phase began on September 29, 1980. The State called sixteen witnesses including Cook, Robert Farr, and Marcus Jefferson. On September 30th, the State rested; Banks rested without presenting a defense. The jury retired at approximately 8:00 p.m., and returned its verdict about three hours later, finding banks guilty of capital murder. App. 12.

A. Evidence at guilt/innocence

On direct appeal, the Court of Criminal Appeals summarized the evidence at guilt/innocence:

> The body of the deceased, Richard Wayne Whitehead, was found in an abandoned park near Nash[, Texas,] on the morning of April 1[4], 1980. [9 RR 2168-69, 2220][11] The deceased had been shot three times, twice in the head and once in the upper back. [10 RR 2389, 2391-95] One shot had been fired at a maximum distance of eighteen to twenty-four inches. [9 RR 2398-99] Near the scene several empty beer cans and two spent shell casings were found. [9 RR 2214-16]
>
> Patricia Hicks testified that she was a friend of the deceased and that she was with the deceased during the evening of April 11, 1980. [9 RR 2140-43] Whitehead was driving his automobile, a two-door 1969 Mustang with a light green colored body, a

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[11] "RR" refers to the Reporter's Record of transcribed trial testimony and evidence from Bank's trial, preceded by volume number and followed by page reference.

> black vinyl top, and red hood.[12] During the course of the evening the pair were joined by [Banks] and at his suggestion beer was purchased. [9 RR 2143-44, 2149] The three went to the park near Nash and drank beer. [9 RR 2144] [Banks's] residence was a little more than a half mile from the park. At approximately 11:00 or 11:15 p.m. Hicks was taken home. [9 RR 2146]
>
> Patty Bungardt testified that [Banks] and the deceased visited her at her house around 11:30 p.m. on April 11[th]. [9 RR 2153-55] They stayed for approximately ten to fifteen minutes. [9 RR 2155]
>
> Mike Fisher testified that he lived about one hundred yards from the park in Nash. [9 RR 2159] At approximately 4:00 a.m. on April 12[th], he heard [what sounded like]

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[12] Ms. Hicks actually testified that Whitehead was driving "a green Mustang with an off-color like hood and a white vinyl top." 9 RR 2141. The jury heard a more exacting description through testimony from Larry Whitehead, the victim's father:

> It was a '69 Mustang, two-door. It was a light green or metalic [sic] green, and had a black vinyl top. Now he had a little wreck in it and messed the front end up and we were rebuilding it there at the house, and had taken parts out of a wrecking yard and some parts [were] new. The hood on it had a new hood, and it was still the primer red color. The front left fender was off a black Mustang, so it was black, and the dome that goes around the headlights on the right front fender was a light blue color, and the grill was still out. We had not put the grill back in it.

9 RR 2162.

two gun shots. [9 RR 2158]

Charles Cook testified that he met [Banks] on the morning of April 12[th] in Dallas. [9 RR 2185] [Banks] was driving a vehicle which had the same description as the deceased's. [9 RR 2186][13] Cook and his wife befriended [Banks] and allowed him to stay with them at Cook's grandfather's home. [9 RR 2286-87, 2293-94]

Cook had noticed a sprinkle of blood on [Banks's] pants and asked [Banks] about it. [9 RR 2288-89] [Banks] told him that he had shot a white boy. [9 RR 2289] Later that evening [Banks] told Cook that he had killed someone. [9 RR 2295] [Banks] told him he had been riding around with a white boy and his girl friend, and after they took the girl home he and the white boy went to the woods together and drank beer. [9 RR 2295] [Banks] decided to kill the person for the hell of it and take his automobile to Dallas. [9 RR 2295-96]

Cook eventually obtained a pistol and the automobile from [Banks]. [9 RR 2299-2300] The pistol was later identified through ballistic testing as the murder weapon. [9 RR 2206, 2247-48; 10 RR 2411-12] [Banks] later returned to Texarkana by bus. [9 RR 2302] Cook sold the pistol to his neighbor and took the automobile to West Dallas and

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[13] Cook described Banks as driving "this green two-tone Mustang ..., brown hood, black on one side, green on the other side, and back the [sic] was green." 9 RR 2286.

left it. [9 RR 2303-05] It was never recovered. The pistol was recovered from the neighbor, Bennie Lee Jones. [9 RR 2306-07][14]

Cook's wife [Ida Marie Cook] and sister [Carol Cook] testified that they saw [Banks] driving a green Mustang on April 12[th]. [10 RR 2339-40, 2364] Cook's grandfather [Bennie Whiteurs] stated that [Banks] stayed at his house for a night or two. [10 RR 2358]

Cook's neighbor, [Bennie Lee] Jones, also testified that he met [Banks] during the same time. [Banks] told him he had a little misunderstanding with someone and had broken his jaw or "something like that." [Banks] asked Jones "did I want to buy any [sic] iron, whatever, to make it back to Texarkana." [10 RR 2351]

After the deceased's body was found [Banks] was placed under surveillance by law enforcement officers. [9 RR 2229] On April 23[rd] or 24[th] they observed [Banks], Marcus Jefferson, and Robert Farr, drive together from Texarkana to Dallas. [9 RR 2230] [Banks] was driving the vehicle and after a few stops he eventually went to where Cook resided. [9 RR 2230-32] The

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[14] Cook also testified Banks made a phone call from Cook's house, and said "that his mother told him to come turn himself in." 9 RR 2298. Phone records documented the collect telephone call to Banks's residence. 10 RR 2371; State's Exhibit 16. Cook identified the number as belonging to his own home. 9 RR 2281.

> officers watched [Banks] leave the automobile, walk to the front door and then return to the automobile carrying an object. [9 RR 2232] Jefferson and Farr testified that when [Banks] returned to the automobile he told them that Cook did not have his gun and Cook gave him another gun. [9 RR 2264-65, 2268-69]
>
> [Banks] did not testify[15] and did not present any evidence.

Banks, 643 S.W.2d at 131-32 (paragraphs reformatted).

B. Argument at guilt/innocence

The Fifth Circuit summarized the State's opening argument and the closing arguments by both parties:

> The State's opening statement, describing what each witness would be called to show, noted that Cook "is an important witness", and that his testimony "is critical". The State also emphasized Cook's criminal history. Among other things, the State told the jury: "Now, this man, Charles Cook, has a bad past. He has been to prison. He has two prior convictions".

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[15] However, Banks testified during the penalty-phase that *inter alia* Farr wanted Banks to get a gun so Farr could commit robberies; that it was Banks's idea "to go get the gun" from Two-Two (Cook's) house in Dallas; and that Banks drove Farr and Marcus Jefferson to Dallas because Farr "was kind of high." 10 RR 2568. On cross-examination, Banks testified that when he went to get his own gun, it was not there, so Two-Two gave him a different gun. 10 RR 2571-72. Banks then denied he went to retrieve his own gun, but rather, simply to get "a gun" from Cook. 10 RR 2572.

> The State essentially repeated these themes in its closing argument. It reviewed the importance of each witness' testimony; and, in the course of doing so, it again devoted significant time to Cook's testimony. Moreover, . . . the State told the jury that "Cook brought you absolute truth". On the other hand, the State also emphasized that: Cook's testimony "was not that of a Baptist preacher and ten Deacons"; "Cook is not President of the Chamber of Commerce . . . [H]e has made mistakes"; and Cook readily admitted, in his testimony, to having two convictions.
>
> Banks did not make an opening statement. At the conclusion of the State's opening statement, Banks'[s] counsel elected not to make a statement until after the State had rested on its case in chief; when the State did so, Banks rested as well.
>
> Banks'[s] counsel, in his closing argument, devoted a significant amount of time to discrediting Cook. Among other things, . . . he referred to the April 1980 affidavit to assert that Cook had lied when he testified that he had not talked to anybody about the case prior to trial. Banks'[s] counsel also devoted a significant amount of time: challenging Cook's credibility by citing his admitted drug use and criminal past; and re-urging the (now-abandoned) trial theory that Cook and Farr were part of a drug ring and involved with the victim's murder.

App. 71-72.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Sup. Ct. R. 10. Such reasons do not exist in this case. The Fifth Circuit applied established federal law, correctly concluded that Banks was not entitled to collateral relief, and vacated the district court's judgment. Banks does not present a compelling reason for this Court to review his claim and, thus, certiorari review should be denied.

I. Certiorari Review is Unwarranted Because the Fifth Circuit Correctly Determined That the Cook Transcript is Not Material *Brady* Evidence.

To establish a *Brady* violation, a petitioner must make three showings: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In Banks's case, the Fifth Circuit determined that suppression of the Cook transcript did not violate his right to a fair trial because even though the evidence was favorable, it was not material and, therefore, the court vacated the grant of habeas relief. App. 28-81. Because the Fifth Circuit properly assessed the Cook-transcript *Brady* claim and found it to be meritless, this Court should deny review.

In this Court, only the materiality prong of *Brady* is disputed.[16] Evidence is material "only if there is a

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[16] Because the district court's opinion intertwined its assessment of whether the evidence was favorable and/or material,

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability of a different result" is shown when the evidentiary suppression "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *Bagley*, 473 U.S. at 678).

The Fifth Circuit was tasked with evaluating the effect that disclosure of the Cook transcript would have had on Banks's trial. App. 40. "Doing so collectively, in this context, entails: examining the usefulness of statements favorable to Banks that were contained in the transcript; and then considering whether all of those statements, considered together and not item-by-item, collectively undermine confidence in the outcome of the trial's guilt-phase." *Id.* After reviewing the evidence in light of this standard, the court correctly determined that the undisclosed Cook transcript is simply not the type of favorable evidence which, if disclosed, could reasonably be taken to put the case in such a different light as to undermine confidence in the guilt phase verdict.

A. The court first thoroughly reviewed all the trial evidence.

The Fifth Circuit began by reviewing all of the trial evidence from the two-day guilt-phase in order to determine whether there is a *reasonable probability* that, had the transcript been disclosed, then the result of proceedings would have been different. App. 40 (citing *Bagley*, 473 U.S. at 682); *see Strickler*, 527 U.S. at 293

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the Director addressed the prongs together, although admittedly the arguments were directed towards materiality. The Director does not challenge the determination that the Cook transcript is favorable.

(detailing evidence provided by other witnesses in its materiality finding). After summarizing testimony from the State's sixteen witnesses at guilt/innocence, App. 40-53,[17] the Fifth Circuit highlighted parts of the evidence, including:

- Hicks and Bungardt testified Banks was with the victim on the night of the murder;
- Huff testified his investigation concluded Banks was the last person to be seen with the victim;
- Fisher testified he heard gunshots coming from the park at approximately 4:00 a.m.;
- [T]he firearms expert opined the recovered bullets that killed the victim were fired by the .25 caliber Galesi pistol.

App. 53 (reformatted).

The court also considered that other witnesses provided testimony similar to Cook's:

- Ida Marie Cook, who testified that Banks approached her and her husband (Cook) at around 8:00 a.m. on [April 12,]1980 in a Mustang matching the distinctive description of the victim's vehicle, that he stayed the weekend with them, and that he left on a Greyhound bus;

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[17] Incredibly, Banks states that much of the evidence summarized by the court (App. 41-55) "does no more then confirm facts uncontested by Banks, namely, that he *spent time with* Richard Whitehead the evening of April 11, and *spent the weekend* of April 12 with Charles Cook and Cook's family." Cert. Pet. 21 (emphasis added).

- Whiteurs, who testified that Banks spent the weekend with Cook at his house;
- Carol Cook (Cook's sister), who testified that Banks and Cook visited her on [April 12,] 1980 in the distinctive, multi-colored Mustang;
- Bennie Lee Jones, who testified that Cook sold to him, and subsequently reclaimed, the .25 caliber Galesi murder weapon, and who further testified that Banks stated to him that he was in some sort of trouble and that his mother wanted him to turn himself in;
- Hamby, who testified that a collect call had been placed from Cook's house to Banks'[s] parents' house on the weekend in question;
- [Robert] Farr and Marcus Jefferson, who testified that, during the late-April visit to Cook's house, Banks was trying to get "his gun" back from Cook.

App. 53-54.

Additionally, because the dissent (App. 86) urged that without Cook's testimony, the jury would have nothing more than "suspicion" that Banks committed capital murder, the Fifth Circuit then summarized the "overwhelming evidence" supporting Banks's conviction:

> Had Cook not testified, the jury still would have had evidence showing, *inter alia*: Banks was the last person seen with the victim; the victim was found murdered in the portion of the park where he and Banks had earlier been drinking beer together;

> Banks then, after gunshots were heard in the park, traveled approximately 175 miles to Dallas, Texas, in a distinctive green, red, and black Mustang matching the description of the victim's vehicle; Banks told Cook's neighbor he was in some sort of trouble; the murder weapon showed up in Cook's house—175 miles from the scene of the crime—on exactly the same weekend Banks did, despite Banks'[s] and Cook's not having known each other until that weekend; and Banks later returned to Cook's house to reclaim "his gun".

App. 54-55.

The court explained that the purpose of its evidentiary review is to assist in evaluating the Cook transcript's materiality by exploring the extensive corroboration of almost all of Cook's testimony and by placing the testimony into context with all of the other evidence supporting Banks's conviction. App. 57-58. Importantly, the same assessment ultimately contributed to the court determining that the favorable impeachment evidence could not reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. App. 58 (citing *Kyles*, 514 U.S. at 435).

B. The court considered what counsel might have been able to accomplish had the transcript been disclosed.

Next, the court focused on how counsel could have utilized the Cook transcript had it been disclosed prior to

trial. App. 58-73. [18] The court considered its value during cross-examination and during closing argument.

1. Transcript could be used to show Cook was untruthful about not talking to anyone about his testimony

The court found that counsel could have used the transcript primarily to show Cook was not truthful when, during his trial testimony, he denied three times having talked with anyone before trial about his testimony. App. 59. The record reflects that Cook was asked on cross-examination:

> Q: Who all have you talked to about this, Mr. Cook?
>
> A: I haven't talked to anybody about it.
>
> Q: You haven't talked to anybody?
>
> A: No, sir.
>
> Q: Mr. Raffaelli just put you on the stand not knowing what you're going to say, is that what you're telling me?
>
> A: That's what I'm telling you.

9 RR 2314. The court properly discounted the value of this evidence. Importantly, the court emphasized that "there is absolutely nothing improper about the prosecutors' having interviewed Cook prior to trial." App.

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[18] Importantly, while the transcript contains some inconsistencies, there is nothing in the transcript that directly contradicts Cook's trial testimony. App. 59. In fact, the court found that the transcript "generally mirrors Cook's trial testimony and his April 1980 affidavit." *Id.*; *see* Statement of Facts, II. & III., *supra*.

59. Indeed, the pretrial interview practice was in existence long before this trial, and it is "completely proper" under Texas law in existence at the time of trial. App. 60-61. Furthermore, there is little (if any) impeachment value by merely showing that Cook met with prosecutors. App. 60. While Banks could have used the transcript to impeach Cook by showing that he did talk about the case beforehand with prosecutors, Banks's counsel was provided Cook's April 1980 affidavit at trial and used it to argue in the same manner. App. 61-62. Furthermore, along this line, the jury was already aware (for credibility purposes) that Cook had not been truthful about not talking to others.

Furthermore, had jurors known that Cook had spoken to prosecutors prior to his testimony about his encounter with Banks, that knowledge would have done nothing to undermine Cook's recollection of events. Jurors would have simply been made aware that, as with the great majority of criminal cases, prosecutors had conducted witness interviews to determine what their witness's testimony might be. Although defense counsel may have endeavored to make Cook's testimony appear rehearsed based on such an interview, jurors would have surely seen that such routines were not improper, as explained above.

2. **Transcript could be used to show an inconsistency regarding Cook's assault victim**

During the pretrial interview, Cook told investigators that he had assaulted a school teacher, however, during his trial testimony a few days later, when Cook was asked "who" he assault, he said he could

not remember. PX B-4 at 33; 9 RR 2283.[19] The Fifth Circuit found that had the transcript been disclosed, then counsel could have used it to show an inconsistency with Cook's testimony. App. 62-63.

However, the court correctly refused to consider the handwritten notations contained in the transcript (*e.g.*, "do not say") in assessing materiality. Since the handwritten notes are work product, had the transcript been disclosed to Banks, those notes would not have been included. App. 37-38 (citing *Rose v. State*, 427 S.W.2d 609, 611 (Tex. Crim. App. 1968)). While Banks insists that Cook's inconsistent answer shows improper witness coaching, Cert. Pet. 35-37, the Fifth Circuit rejected the assertion because there is no evidence establishing Cook ever saw the notes, or the actual transcript, prior to trial. App. 38. There is also no proof that Cook ever altered his trial testimony about his prior conviction as a result of coaching. For example, the transcript does not evidence prosecutors instructing Cook to "forget" any details. *See* PX B-4. Nor did Cook testify during the federal hearing that he was ever instructed in this manner. 6 R 132-60.

3. Transcript could be used to identify additional inconsistencies

The Fifth Circuit also found that Banks could use the transcript to point out inconsistencies between it and Cook's April 1980 affidavit. App. 63-64. For example, Cook's testimony was inconsistent about whether he first noticed Banks's pistol—that tested to be the murder weapon—on Saturday night or Sunday morning; and Cook was unsure whether he gave Banks "brown pants

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[19] When Cook was asked "do you remember who you assaulted?," he answered, "No, sir, I can't remember. That's been about eight or ten years ago." 9 RR 2283.

and a blue shirt" to change in to, or whether it was really "blue pants and a flowered shirt." PX B-2 at 1; PX B-4 at 6. Other inconsistencies listed by Banks included when Cook first saw blood on Banks's leg, and whether Cook left the keys to the victim's car in the ignition or under the car seat when he abandoned the car. Banks cannot seriously contend that Cook's testimony would have been impeached on such basis. In any event, there should be no surprise that where, as here, a witness has provided two statements to police some five months prior to trial, that some additions or omissions may occur in remembering earlier events.

Further, while there was some confusion over whether it was Cook or Banks who sold certain items from the victim's car (such as jumper cables, a radio, a case of oil, and a tool box), both Cook and Bennie Jones testified at trial that Cook sold him Banks's pistol, a tool box, and a set of jumper cables. 9 RR 2136; 10 RR 2349-50. The Cook transcript is consistent, but adds the fact that Banks sold the radio and a case of oil from the car. PX B-4 at 13-14, 30. The transcript has no impeachment value in this regard, and it cannot be said to be material.

Considered together, the Fifth Circuit was not impressed with the "minor inconsistencies" because, instead, the Cook transcript and the April 1980 affidavit are both "quite consistent" with Cook's trial testimony on the major points at issue:

> All provide largely-identical accounts: of Banks'[s] weekend with the Cooks in Dallas, supported in part, *inter alia*, by the testimony of Ida Marie Cook, Bennie Lee Jones, Bennie Whiteurs, Carol Cook, and Lou Ann Hamby; and of Banks' subsequent return to Dallas to get "his gun", supported

> in part, *inter alia*, by the testimony of Marcus Jefferson, Robert Farr, and Investigator Willie Huff. As discussed in more detail *infra,* for such reasons, the Cook transcript would also have been helpful to Banks because, during closing argument, the prosecution stressed to the jurors that Cook had been honest with them.
>
> Beyond these points, however, the transcript provides very little impeachment value. Contrary to Banks' assertions, it consists largely of nothing more than pages of recollections by Cook, with inconsistencies in those recollections later pointed out by those conducting the interview. As our examination, below, of the question-and-answer exchanges between Cook and the interviewers demonstrates, the extensive "coaching" claimed by Banks is simply *not* present.

App. 63-64 (paragraph reformatted). The Cook transcript is not material given the marginal value of the omitted evidence. *Pyles v. Johnson*, 136 F.3d 986, 999 (5th Cir. 1998) (*Brady* evidence with "marginal negative impact on jury's credibility assessment" does not warrant relief); *Drew v. Collins*, 964 F.2d 411, 419-20 (5th Cir. 1992) (*Brady* evidence with only "incremental impeachment value" does not warrant relief).

4. **Transcript would not have affected guilt/innocence argument.**

Finally, the Fifth Circuit assessed whether the transcript's suppression affected the State's opening statement (Banks did not make one) and both sides'

closing arguments to ensure that the materiality vel non of the Cook transcript is fully evaluated. App. 70-73; *Strickler*, 527 U.S. at 290-91 (considering the prosecutor's closing argument, which emphasized the importance of the testimony of the witness at issue, in deciding that *Brady's* materiality prong was not satisfied). *See* Statement of Facts, III.B., *supra*. In this regard, the court found that the availability of the transcript would likely not have changed the approach pursued by either party, nor would it have significantly altered the effectiveness of those approaches. App. 73. For example, the court noted that Banks's counsel, by using Cook's April 1980 affidavit, "argued to the jury that Cook had lied about not talking to anyone prior to trial; and both parties made the jury more than well aware that Cook was a drug user with an extensive criminal past." App. 73.

C. The court collectively assessed materiality.

Materiality must be assessed collectively, not point by point. *Kyles*, 514 U.S. at 436. In this final undertaking, the Fifth Circuit again explained the facts at trial from evidence which were independent of Cook, and other evidence substantially corroborating Cook's testimony. App. 77-78. As the court explained, "we must consider the trial's guilt phase as a whole to properly assess the importance of the Cook transcript. While Banks was in Dallas, Cook had more interaction with him than did any other witness, and, accordingly, was able to provide the most complete narrative of Banks' weekend in Dallas." App. 79. The court weighed the fact that Cook was the only witness who testified: to seeing blood on Banks' trousers; to seeing Banks in actual possession of the murder weapon; and that Banks had confessed to the murder, and acknowledged, that he was

"indeed a key witness." App. 79. On the other hand, of course, not all key witnesses are of the same degree of importance. *See Wilson v. Whitley*, 28 F.3d 433, 439 (5th Cir. 1994) ("[W]hen the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material".)

Additionally, by placing Cook's testimony into context, it demonstrated that the evidence provided by Cook was largely corroborated by other witnesses at trial. App. 80-82. As the court reasoned:

> The credibility of Cook's testimony was not only buttressed by its consistency with the other evidence presented during the trial's guilt phase; it was, as noted earlier, also buttressed by its consistency with his first written statement to the police—the April 1980 affidavit made available to Banks' counsel at trial. In this regard (and considering, additionally, that the jury was already well aware—without the Cook transcript—that Cook had an extensive criminal history), failing to disclose the transcript of this single, *completely permissible* pre-trial interview with prosecutors cannot be said to "undermine[] confidence in the outcome of the trial", *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

App. 80-81. Finally, after re-assessing the possible use of the transcript, the court was left with the firm conclusion that, in light of the record evidence, the Cook transcript fails to satisfy Brady's materiality prong:

> Assessing the Cook transcript's materiality, we find that it, at best, could have been used to impeach Cook: with respect to his denial that he had discussed his testimony with others prior to trial (which, of course, Banks' counsel used the available April 1980 affidavit to do); with respect to his not being able to identify the person he had assaulted in 1972; with respect to when, exactly, he first noticed the blood on Banks' trousers; and possibly with respect to a few other factual inconsistencies. Along that line, even though the jury was well aware of Cook's criminal history, the Cook transcript might have further diminished Cook's credibility with the jury.
>
> Given, however, the jury's existing knowledge of Cook's criminal past, and further given the overall consistency of Cook's testimony with his April 1980 affidavit and the extensive corroboration of his testimony by other witnesses at trial, it cannot be said that the assorted additional impeachment points that might have been raised, had the Cook transcript been disclosed, render its suppression material under *Brady*. The transcript falls far short of undermining confidence in the guilt phase's outcome.

App. 81-82. The Fifth Circuit reasonably considered the entirety of the evidence, then thoroughly followed this Court's precedent in assessing the merits. On this record, the Court should deny certiorari review.

II. Certiorari Review is Unwarranted on Banks's Challenges to the Fifth Circuit's Decision Vacating the Grant of Relief.

A. The Fifth Circuit did not "erroneously discount" this Court's 2004 opinion.

Because *Brady* claims are mixed questions of law and fact, the Fifth Circuit reviewed Banks's claim de novo. App. 28-29 (citing *Bower v. Quarterman*, 497 F.3d 459, 466 (5th Cir. 2007)). Yet Banks argues the Fifth Circuit erred in discounting the "merits assessment" conducted by this Court in 2004 when Banks's case was originally on appeal. Cert. Pet. 17-18. He insists the parties "vigorously contested" the materiality of the Cook transcript in briefing and the Court, considering those arguments and the record, determined that Cook was an "essential prosecution witness," that the transcript "would have allowed Banks to discredit Cook," and that Cook was "intensively coached by prosecutors and law enforcement officers." *Id.* (citing *Banks*, 540 U.S. at 675).

Although the Court did make such statements in dicta, the Cook-transcript issue was before the Court on Banks's appeal of the denial of COA and even then, it raised a purely legal question: whether Rule 15(b) is applicable to habeas proceedings. AEDPA requires application of the COA standard, and expressly prohibits courts from conducting anything more than a threshold-merits assessment. As this Court has explained,

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that

> resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Banks's arguments fail to establish error.

B. The Court lacks jurisdiction to reach Banks's final argument; alternatively, the Fifth Circuit correctly refused to consider the State's "purposeful" suppression in assessing materiality.

Banks argues the Fifth Circuit erred by excluding the "purposefulness" of the State's deception in suppressing evidence that Robert Farr was a paid informant. Cert. Pet. 39-42. As an initial matter, the Court arguably lacks jurisdiction to consider this claim because it was never raised by Banks in the lower court. *See* App. 34-35 (addressing claim only because raised by dissent, and noting that issue was never raised by Banks). Issues must not only be raised in prior proceedings, but they must be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

Even if the issue should be considered, it would not merit review. Banks insists that the Fifth Circuit erred by failing to consider the State's "purposefulness" or "pattern of misconduct" in weighing the evidence. Cert. Pet. 39-40. This argument fails on any number of levels.

While Robert Farr's paid informant status was not disclosed at trial, there is no evidence of any sort of deliberate act or misdeed by the State's failure to disclose the Cook transcript and, thus, no pattern of misconduct

to consider. In any event, even if such evidence could be found, it plays no part in *Brady* analysis. If evidence is suppressed, it is irrelevant whether it occurred purposefully or by simple mistake. *Strickler*, 527 U.S. at 282 (*Brady* requires showing that evidence was suppressed by the State, either willfully or inadvertently); *Brady*, 373 U.S. at 87 (due process is violated by suppression "irrespective of the good faith or bad faith of the prosecution"). Additionally, such an argument appears to improperly merge the suppression and materiality prongs of *Brady*, suggesting perhaps that because there was a purposeful or intentional suppression of favorable evidence, then finding materiality is a means of sanctioning the prosecution.

In any event, the fact that the State suppressed evidence concerning Robert Farr's status as an informant—evidence which was material to punishment—that suppression (or the "purposefulness" of the nondisclosure) does not help Banks establish the materiality of the suppressed Cook transcript. It is undisputed that Robert Farr testified at both stages of trial, and that the jury was never informed that he was a paid police informant. However, this Court granted habeas relief on the Farr paid-informant *Brady* claim "solely with respect to the capital sentence." *Banks*, 540 U.S. at 689. There is no Robert Farr *Brady* claim before the Court that concerns guilt/innocence.

When the Robert Farr *Brady* allegations were in the district court, that court found that the suppression of his paid informant status immaterial for guilt/innocence. *Banks*, 2000 WL 35482430, at *2. Indeed, the record establishes that Farr's testimony at guilt/innocence "was minimal and essentially repetitive of Marcus Jefferson's earlier testimony." App. 75. Farr

testified that he was with Banks and Marcus Jefferson on the April 1980 trip to Dallas; that after they visited Cook's home, Banks returned to the vehicle and "said that *his* gun was in West Dallas, and [Cook] gave him a .22." Marcus Jefferson (who testified *before* Farr), reported that he went to Dallas with Farr and Banks, and that Banks returned to the car and said "some broad had *his* gun, so they gave him another gun." Thus, even if the evidence of Farr's status as a police informant was considered at guilt/innocence, his testimony was strongly corroborated and, thus, the impeachment value is not material. *Kopycinski v. Scott*, 64 F.3d 223, 226 (5th Cir. 1995) (citing *United States v. Weintraub*, 871 F.2d 1257, 1262 (5th Cir.1989)).

CONCLUSION

For the foregoing reasons, the Court should decline to grant certiorari review.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

ANDREW WEBER
First Assistant
Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

*KATHERINE D. HAYES
Assistant Attorney General
Postconviction Litigation Division

* Counsel of Record

Texas Attorney General's Office
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
(512) 936-1400 telephone
(512) 320-8132 telecopier

ATTORNEYS FOR
RESPONDENT THALER